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Supreme Court of the United States

OCTOBER TERM, 1944

NO. 537

GREAT AMERICAN INDEMNITY COMPANY,
Petitioner,

versus

LYMAN FLENIKEN, ET AL,
Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, and Brief in support thereof.

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HAUSER PRINTING CO., INC., NEW ORLEANS

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LYMAN FLENIKEN, ET AL,
Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, and Brief in support thereof.

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

Great American Indemnity Company, defendant, prays that a writ of *certiorari* issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered in the above entitled cause on May 25, 1944 (R. 42), reversing the judgment of the District Court for the Eastern District of Louisiana entered on July 23, 1943, (R. 14), and remanding the case to the Court for further proceedings not inconsistent with its opinion.

By stipulation (R. 1) the record on the former appeal in the case of Lyman Fleniken et al vs. Great American

Indemnity Co., No. 10,247 on the docket of the Circuit Court of Appeals for the Fifth Circuit, was made a part of this record but was not reprinted. This is the same record which was filed in this Honorable Court on April 16, 1943 in connection with the plaintiffs' (respondents herein) petition for certiorari, and which bears Docket No. 738 of the October, 1942 Term of this court. All references to the record in this petition are to the transcript of record filed in connection with the instant petition for *certiorari* unless otherwise noted.

STATEMENT

Lyman Fleniken and his wife, (hereinafter sometimes referred to as "respondents") filed suit in the District Court of the United States for the Eastern District of Louisiana, against Great American Indemnity Company, (hereinafter sometimes referred to as "petitioner") for damages caused by the alleged negligent operation of an automobile by a driver alleged to have been covered by a Non-Ownership Liability Insurance Policy issued by the petitioner to the Capital City Press. (References to proceedings affecting Third Parties are omitted.) On the trial of the case at the close of the introduction of all the evidence, petitioner moved for a directed verdict in its favor (R. 938 p. 228). This motion was denied and in accordance with Rule 50 (b) of the Rules of Civil Procedure, "the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion." The case was then submitted to the jury, a verdict in favor of respondents was returned and judgment in accordance therewith was entered (R. 938 p. 244). Thereupon, within the delay provided, petitioner filed a motion under Rule 50 (b) to have the verdict set aside and to have judgment entered

in its favor and against respondents in accordance with its prior motion for a directed verdict; and in the alternative, to set aside said verdict and grant a new trial of all the issues for the reason stated therein (R. 938 p. 245). Notice of the filing of this motion was given opposing counsel but a copy thereof was omitted from the printed record (R. 938 p. 246). Upon hearing thereof, the motion was denied except as to the excessiveness of the verdict (R. 938 p. 247). As to the latter the trial judge said that he would grant a new trial unless a *remittitur* was entered in the amounts suggested by him. Whereupon plaintiffs entered a *remittitur* and a new trial was denied and judgment in the reduced amounts was entered in favor of respondents. (R. 938 p. 251).

Petitioner appealed the case to the Circuit Court of Appeals for the Fifth Circuit, and assigned as reversible error the District Court's refusal to grant the motion for a directed verdict in favor of petitioner made at the close of all the evidence and renewed after entry of judgment as aforesaid. Upon the evidence adduced at the trial, the **Court of Appeals for the Fifth Circuit determined that as a matter of law the District Court had erred in not granting said motion.** The opinion rendered on February 1, 1943 in No. 10,247, reported in 134 F. 2d 208, decrees as follows:

> "The motion of defendant appellant (petitioner) for a verdict in its favor should have been granted. The judgment is reversed and the cause is remanded for further and not inconsistent proceedings." (Emphasis and parenthesis ours.)

On February 20, 1943, respondents filed a petition for a rehearing, which was denied on March 12, 1943. Respondents' petition for *certiorari* was filed in this Hon-

orable Court on April 16, 1943, and was denied on May 17, 1943. A petition for a rehearing on their petition for *certiorari* was denied on June 14, 1943. (See 319 U. S. 753, 87 L. Ed. 1706, 63 S. Ct. 1167).

On July 23, 1943, upon the motion of petitioner (R. 13) and in pursuance to the mandate of the Circuit Court of Appeals dated May 26, 1943 (R. 3) the Judge of the District Court signed an order setting aside and vacating the judgment of the District Court, as amended, and granting the petitioner's motion for a directed verdict (R. 14). Respondent, on August 20, 1943, filed a motion in the Circuit Court to recall the mandate previously issued and to grant a rehearing on the ground that the decision was not in accord with the established jurisprudence and latest expression of the Supreme Court of Louisiana in *LeBlanc v. New Amsterdam Casualty Co.*, 202 La. 857, 13 So. 2d 245 (1943). This motion was denied on August 25, 1943 and on October 8, 1943 respondents filed a motion in the District Court to set aside its judgment of July 23, 1943 (R. 15). After a hearing, the motion to set aside the judgment was denied on October 27, 1943 (R. 26).

Respondents appealed to the Circuit Court of Appeals and on May 25, 1944 that Court reversed the judgment of the District Court and remanded the cause to the latter Court "for further proceedings not inconsistent with this opinion." 142 F. 2d 938 (R. 45). Petitioner applied for a rehearing on June 12, 1944 (R. 47) and on August 24, 1944 the Circuit Court denied its petition (R. 50). On the application of petitioner the issuance of a mandate was stayed for a period of thirty days from September 4, 1944 (R. 53).

THE QUESTION PRESENTED

The question is whether respondents were entitled to notice and an opportunity to be heard upon the matter of entering judgment on the mandate; in other words, whether it was the ministerial duty of the District Judge, after receiving the mandate, to grant the motion of petitioner for a directed verdict and enter judgment without notice to the respondents.

STATEMENT OF JURISDICTION

(1) This Court has jurisdiction to consider and grant this petition pursuant to Judicial Code, Section 240, as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. A. Section 347 (a).

(2) The original date of the judgment to be reversed is May 25, 1944 (R. 42). The petition for rehearing was filed on June 12, 1944, within the time provided by the rules of the Circuit Court of Appeals (R. 47), and the petition for a rehearing was denied on August 24, 1944 (R. 50). The petition for *certiorari* was filed within the time prescribed by the Act of February 13, 1925, as amended, on which jurisdiction rests.

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred:

(1) In reversing the judgment of the District Court.

(2) In holding that the reversal on appeal of the final judgment of the District Court in No. 10,247 on the docket of the Circuit Court, (R. 5), and the remand of that cause for further and not inconsistent proceedings did not reinstate the motion of the petitioner for a directed verdict, and in the alternative, for a new trial, in view

of the Circuit Court's opinion that the said motion for a directed verdict should have been granted.

(3) In holding that it is within the discretion of the District Court to allow the said motion to be renewed and to rule on it.

(4) In holding that respondents were entitled to a hearing on the motion for judgment in accordance with the mandate and the Circuit Court's opinion that judgment for a directed verdict in favor of petitioner should have been granted so that respondents could present their objections to such procedure and ask for a trial *de novo*.

(5) In following the opinion in *Madden Furniture Company vs. Metropolitan Life Insurance Company*, 127 F. 2d 837 (5th Cir., 1942).

(6) In holding that the decision in *Roth vs. Hyer*, 142 F. 2d 227, (5th Cir. 1944) is applicable.

REASONS RELIED ON FOR GRANTING THE WRIT

(1) The decision is in conflict with a long line of decisions of this Court holding that when a case has been decided by an appellate court and remanded to the District Court, every question which was before the former court and which was disposed of by its decree is finally settled and determined; the District Court is bound by the decree and must carry it into execution according to the mandate.

Sibbald v. United States, 12 Pet. 488, 492, 9 L. Ed. 1167;

Clark v. Keith, 106 U. S. 464, 465 1 S. Ct. 568, 27 L. Ed. 302;

In re Washington, etc. R. Co., 140 U. S. 91, 11 S. Ct. 673, 35 L. ED. 339;

Gaines v. Rugg, 148 U. S. 228, 243, 13 S. Ct. 611 37 L. Ed. 432;

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In re Potts, 166 U. S. 263, 267, 17 St. Ct. 520, 41 L. Ed. 994;

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Ex parte Union Steamboat Co., 178 U. S. 317, 319, 20 S. Ct. 904, 44 L. Ed. 1084;

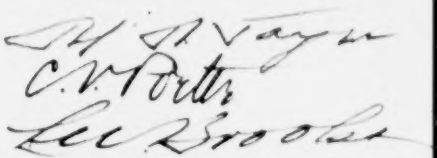
Kansas City Southern Ry. Co. vs Guardian Trust Co., 281 U. S. 1, 10, 11, 50 S. Ct. 194, 74 L. Ed. 659;

Sprague v. Ticonic National Bank, 307 U. S. 161, 168, 59 S. Ct. 777, 83 L. Ed. 1184.

(2) The decision of the Fifth Circuit Court of Appeals in this case and the decision of the same court in *Madden Furniture Company vs. Metropolitan Life Insurance Company*, 127 F. 2d 837, (5th Cir. 1942), *supra*, are in conflict with the decisions of the Circuit Court of Appeals for the Eighth Circuit in *Herzberg's Inc. vs. Ocean Accident & Guarantee Corp.*, 132 F. 2d 438 (1943), *Pike Rapids Power Company vs. Minneapolis, St. P. & S. S. M. Ry. Co.*, 106 F. 2d 891, 894 (1939) and *Carter vs. Thornton*, 109 F. 2d 316 (1940).

(3) It is highly important that Rule 50 (b) of the new Federal Rules be properly construed and applied. We contend that when the Circuit Court of Appeals held on the first hearing that "the motion of defendant appellant for a verdict in its favor should have been granted. The judgment is reversed and the cause is remanded for further and not inconsistent proceedings" (R. 13) it was the ministerial duty of the Judge of the District Court to enter judgment in favor of defendant (petitioner), and notice thereof to respondents was not necessary.

Wherefore, it is respectfully submitted that this petition for *certiorari* to review the judgment of the Circuit Court of Appeals for the Fifth Circuit should be granted.



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September 22, 1944
Brief follows: